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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals, Third Circuit, appears at R. 101-106, and is officially reported in 86 F. (2d) 913. The opinion of the United States District Court for New Jersey appears at R. 29-31 and is officially reported in 16 F. Supp. 949.

Question Presented.

The petition for writ of certiorari granted herein on February 15, 1937, presents the following question:

"The question is whether a court of bankruptcy has power to enjoin a creditor from prosecuting, as against

the trustee, a suit, under Section 57 of the Judicial Code (Act of Cong., Mar. 8, 1875, c. 137, § 8, 18 Stat. 472; R. S. §§ 738, 742; 28 U. S. C. A. § 118) brought subsequent to the adjudication, in a foreign jurisdiction, where the bankruptcy court determines (1) that the trustee was improperly made a party to such suit and (2) that prosecution of said suit against the trustee would constitute an interference with the orderly administration of the bankrupt estate."

Statement of the Case.

Preliminary Statement.

Respondent is willing to stand or fall in this proceeding solely on the question of the lack of power of the bankruptcy court to make the original injunction order (R. 31). Upon petitioner's application to the bankruptcy court (R. 2), respondent submitted no answer but relied entirely upon a motion to dismiss the petition (R. 28). Respondent did not appeal to the discretion of the bankruptcy court for a denial of the petition (R. 2) by facts in its possession which could have been presented by answer to negative petitioner's factual contentions.

Petitioner, in his petition (R. 2), unwilling to rely upon facts pertinent to his application, endeavoring to build up an atmosphere prejudicial to respondent, freely indulged in misstatements of fact and half truths.

In petitioner's brief in this court he still pursues the same tactics. Since respondent's motion to dismiss (R. 28) did not raise the question of the bankruptcy court's discretion, the practice adopted by petitioner in his brief, of arguing and presenting the question of the proper exercise of the bankruptcy court's discretion, could have been intended for no other purpose than to enable him to develop in his brief a series of factual incidents which

are wholly extraneous to the question presented upon this certiorari.

If petitioner can succeed in convincing this Court, upon the record before it, that the bankruptcy court had the power to enjoin the prosecution of respondent's Pennsylvania suit, he is clearly entitled to a reversal of the decree under review. Nothing short of that, however, will suffice. No question of discretionary power is involved in this certiorari.

Throughout petitioner's brief there is strained and tortured effort to have it appear that his controversy with respondent, under review by this Court, arises, from a "conspiracy" in which respondent participated, from a "scheme" of respondent, by respondent's having "taken advantage" of petitioner, and by respondent having been guilty of "establishing a technique" • • • "to harass and delay creditors". Petitioner's approach to a single question of law is vicious, not only because of the unjustified attack made upon respondent, but also because petitioner's supporting facts are not found in the transcript of record nor in any record of which this Court may take judicial notice. Respondent declines to offend the dignity of this Court by indulging in this improper practice and will confine itself to the question of law here presented.

Respondent, at pages 12-17, infra, severely criticizes petitioner's including, in his brief, reference to facts not contained in the record before this Court or before either of the courts below. It is evident that petitioner's practice was conceived solely to create an atmosphere hostile to respondent. For the same reason, petitioner includes Point II of his brief, which discusses a question *never raised or suggested by the record*, conceived solely to divert this Court's attention from the real issue.

Statement of the Case.

Because of petitioner's practice in having included in his "Statement of the Case" alleged facts having no bearing on the issue before this Court and as indicated, not appearing in the transcript of the record, it is necessary for respondent briefly to restate those facts which appear in the record before this Court which are pertinent to the sole issue here presented.

On January 7, 1936, respondent opened a marginal security trading account with the firm of J. W. Sparks & Co. of Philadelphia, Pa. (R. 96-99). Substantial amounts of stock owned and controlled exclusively by respondent (R. 22, 94-95) were placed to the credit of this account in Philadelphia, Pa. (R. 19, 92). Although J. W. Sparks & Co. maintained a branch office in the City of New York, N. Y. (R. 24), respondent's account had been opened in Philadelphia, Pa. (R. 19, 92), where respondent's securities were at all times maintained (R. 19, 92). Nowhere does petitioner contend that the bankrupt ever had possession of any of the securities in this account.

On March 27, 1936, the Capital Company, pursuing a judgment which it obtained in the District Court for the Southern District of New York in July, 1935 (R. 19), caused a subpoena in proceedings supplementary to judgment to be served upon the brokerage firm of J. W. Sparks & Co. as a "third party" (R. 20), which subpoena contained a provision pursuant to § 781 of the Civil Practice Act of the State of New York (Laws of New York, 1935, Ch. 630, § 1, p. 1270), which provided that the said third party is forbidden to transfer property belonging to the judgment-debtor until further order of the court (R. 20, 24-26). It further provided that anyone who violates "the provisions of such restraining provision shall be subject to punishment by the court by fine or imprison-

ment, or either, as and for a contempt" (R. 20, 24-26). This subpoena upon which this injunction provision was endorsed ordered the said J. W. Sparks & Co. to appear and be examined

> "concerning properties or monies of William Fox, judgment-debtor, in your possession now or at any time since January, 1929, held either in his name or in the name of • • • All Continent Corporation [and more than twenty other persons]" (R. 25).

The form of this subpoena is without precedent in the history of proceedings supplementary to judgment, in the State of New York. The attempt to compel J. W. Sparks & Co. to be examined concerning property of the judgment-debtor standing in his name "or in the name of All Continent Corporation", combined with the injunction which prevented J. W. Sparks & Co. from transferring any assets of the judgment-debtor William Fox, served only to give notice to J. W. Sparks & Co. that some claim was being made by Capital Company, the judgment-creditor, that these assets in the hands of J. W. Sparks & Co., although standing in the respondent's name and apparently the respondent's exclusive property, may in fact be the property of the judgment-debtor. The sole purpose of Capital Company in serving the subpoena in the form which it adopted was to prevent respondent from properly dealing with its own assets in the ordinary course of its business, in the hope that it could thereby tie up those assets long enough to enable it to obtain a binding adjudication in some forum decreeing that the assets actually belong to William Fox and not to respondent. Having adopted this ingenious procedure, it ill becomes Capital Company, or petitioner, who now seeks to avail himself of the Capital Company's action, to criticize respondent for any action which it took to relieve itself from an unjustifiable attack upon title to

its assets. While respondent would clearly have the right to take such action in any case, its right ripens into a duty for immediate action, when we have in mind that its failure to act promptly might have resulted in its losing, in its entirety, this valuable asset, having an equity at that time in excess of $200,000 (R. 19, 94).

J. W. Sparks & Co., upon service of the subpoena, promptly moved to vacate it in an effort to clarify the meaning and scope of the subpoena (R. 20). Ultimately, the Circuit Court of Appeals for the Second Circuit decided that the injunctive provision of § 781 of the Civil Practice Act of the State of New York was valid, but that it merely "measures the extent of the prohibition by the judgment-debtor's ownership of the property; the 'third party' is forbidden to transfer only what property he [the judgment-debtor] owns, and cannot be punished without proof that any property thereafter transferred was the debtor's in fact" (R. 21; *Capital Co.* v. *Fox* [C. C. A. 2, 1936], 85 F. [2d] 97, 101).

As a result, J. W. Sparks & Co., under pain of punishment for contempt, refused to transfer any of the assets of the brokerage account when requested to do so on behalf of respondent, and prohibited respondent from carrying on its ordinary business (R. 22, 93, 94).

Petitioner states in a footnote, page 6 of his brief, that "the validity of the subpoena was upheld by the Circuit Court of Appeals, for the Second Circuit, in *Capital Co.* v. *Fox*, 85 F. (2d) 97". He fails to state that this decision did not attempt to determine the true ownership of the assets of respondent. In fact, in the opinion of Judge LEARNED HAND, he said:

> "The next objection is that § 781 of the Civil Practice Act is unconstitutional in imposing an injunction without a judge's order. If the statute affected to declare in advance of a hearing that the plaintiff's attorney might forbid the 'third party's' trans-

> fer of any specific property under pain of contempt, there would indeed be much to say for that argument. It does not do so; it measures the extent of the prohibition by the judgment debtor's ownership of the property; the 'third party' is forbidden to transfer only what property he owns, and cannot be punished without proof that any property thereafter transferred was the debtor's in fact. The statute therefore does no more than declare it unlawful to transfer a judgment debtor's property after notice and impose the penalty of contempt for disobediance. It anticipates no judicial decision; it merely creates a new class of unlawful acts, as statutes have done from time immemorial. We are not to be deceived by the fact that the command of the statute is called an injunction, or that it is punished by a court, not by trial with jury" (R. 21; *Capital Co.* v. *Fox,* 85 F. [2d] 97, 101).

Respondent stood by, awaiting the outcome of the proceedings instituted by J. W. Sparks & Co. At the conclusion of those proceedings in August, 1936 (R. 20), respondent still found itself in the same precarious position. It still had a security margin account which secured a debit balance in excess of $300,000 (R. 94) and had an equity value of more than $200,000 (R. 19). If the stock market broke at any time and a demand for further margin were made on respondent, it would have been unable to protect itself by selling securities in the account in order to cover its position. On the other hand, J. W. Sparks & Co. could not and would not permit respondent to deal with this account (R. 22, 95) because J. W. Sparks & Co. could not assume the responsibility of determining if Capital Company or petitioner might later succeed in proving some claim to the ownership of these assets (R. 95).

The statement contained at page 29 of petitioner's brief to the effect that respondent's assets contained in

the account with J. W. Sparks & Co. constituted only a "small fraction of its assets" is unjustified by anything within or outside of the record. The fact is that this account is one of respondent's most substantial assets.

Thus respondent's account with J. W. Sparks & Co. has, for one year, been put and kept in peril, at the mercy of the winds, solely through the conduct of Capital Company and petitioner (R. 94) without a single act of respondent's contributing to that situation or to the situation that now brings respondent before this Court. It was only by reason of the fortunate circumstance of a steadily rising security market since March of 1936, when the subpoena was served by the Capital Company upon J. W. Sparks & Co. (R. 20), that respondent's equity has been saved.

Shortly after the commencement of the bankruptcy proceedings and in the months of June and July, 1936, the bankrupt, who was still being pursued by creditors in various jurisdictions in spite of the bankruptcy proceedings, sought to confine the many proceedings against him, within the bankruptcy court. An application was therefore made in the bankruptcy court to restrain these proceedings, including the proceedings in which the subpoena had been served upon J. W. Sparks & Co. (R. 21-22, 94). When that application came on for hearing before the bankruptcy court, the petitioner joined with Capital Company in opposing same, and the application was denied (R. 21-22, 94). The Sparks account continued to be tied up. Petitioner's participation in that proceeding is evidenced by the order entered therein, dated July 7, 1936.

While the account with J. W. Sparks & Co. remained in jeopardy, no attempt was made by petitioner to litigate the issue as to his right to the account, nor did the Capital Company institute or suggest any such proceedings. In fact petitioner and Capital Company were

apparently content to tie up that account and prevent respondent from functioning in the normal course of its business.

Thus the act of the Capital Company, in serving this unusual subpoena (R. 20, 24-26) and the act of the petitioner joining in the request for a continuance thereof (R. 21-22), created a cloud upon the title to the assets in this brokerage account. Under these circumstances there was no forum to which respondent could go for the purpose of getting an adjudication upon its rights, other than the United States District Court for the Eastern District of Pennsylvania. The *res*, the stocks constituting the assets in the account, were located in the City of Philadelphia, within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania (R. 19, 92). All the rights of the parties, whose acts had created this uncertainty and this cloud, could be adjudicated in the United States District Court for the Eastern District of Pennsylvania. It was impossible to get any adjudication in New York as suggested by counsel for the petitioner because there existed no basis, either *in rem* or *in personam*, upon which the petitioner, a citizen and resident of the State of New Jersey (R. 18), could have been brought in and effectively made a party to such a suit. In New Jersey, likewise no proper adjudication could be had because neither Capital Company, a corporation organized and existing under the laws of the State of California, a citizen and resident of California (R. 18), nor the stock itself was in that jurisdiction. This action, hereinafter referred to as the Pennsylvania suit, was commenced on September 8, 1936 (R. 31), in the only forum in which an *in rem* action could be brought against non-resident defendants.

In accordance with the express provisions of § 57 of the Judicial Code (Act of Cong., Mar. 3, 1911, c. 231, § 57, 36 Stat. 1102; 28 U. S. C. A., § 118), authorizing the par-

ticular proceeding which was instituted, due service was effected not only upon the resident J. W. Sparks & Co., but upon the non-resident defendants Capital Company, a California corporation (R. 100), and petitioner (R. 6, 7). Immediately upon the institution of this action, these defendants, acting together, attempted to thwart every effort to obtain a prompt and final adjudication of the dispute that had arisen solely through their conduct (R. 2, 100). In the first place, petitioner by a petition concealing the true facts went to the bankruptcy court and there sought an injunction restraining respondent from proceeding with the Pennsylvania suit (R. 2). His affidavit is dated September 21, 1936 (R. 16). The petitioner's petition (R. 2) recites that proceedings instituted pursuant to § 21(a) of the Bankruptcy Act (Act of Cong., Feb. 5, 1903, c. 487, § 7, 32 Stat. 798, 11 U. S. C. A., § 44[a]) (R. 3) were being conducted *not by the petitioner* but by Capital Company and another creditor (R. 3); that not until the completion of these § 21(a) examinations would petitioner be in a position to "enter upon the trial of the question of the ownership of the property and assets mentioned in the said [Pennsylvania] bill of complaint" (R. 7); that the Pennsylvania suit against him would disturb the orderly procedure by which Capital Company is acquiring the required information. Petitioner, pursuant to his order to show cause why the entire Pennsylvania suit should not be enjoined (R. 27-28), therefore prayed for an injunction against the continuance of the *entire* Pennsylvania suit (R. 9).

It is plainly apparent that the order of the bankruptcy court, dated October 7, 1936 (R. 31), entered upon petitioner's application, was procured for the single purpose of interfering with the normal and proper exercise by the United States District Court for the Eastern District of Pennsylvania, of the latter's first

and exclusive jurisdiction to determine the ownership and right to immediate possession of the *res* within its jurisdiction. Within one week after the order of the bankruptcy court enjoining respondent from further prosecuting its suit in the United States District Court for the Eastern District of Pennsylvania against petitioner, the latter commenced his plenary suit in the Chancery Court of the State of New Jersey (R. 36-90) and served upon respondent and other co-defendants a voluminous set of papers including a bill of complaint (R. 36-66), an affidavit in support thereof (R. 66-88), and an order to show cause with a restraining order (R. 88-90), restraining the respondent from further conduct of its business (R. 90), and, in addition, praying for the appointment of a receiver for respondent on the theory that respondent was in reality the "alter ego" of the bankrupt, William Fox (R. 90).

In addition, as that bill of complaint will show, petitioner secured permission from the referee in bankruptcy (R. 36), before whom the § 21(a) examinations were pending, permitting the aforesaid plenary suit in Chancery in New Jersey. *All these acts were done during the pendency of the § 21(a) examinations which have not yet been concluded.*

By virtue of this restraining order (R. 88-90), respondent's margin account with J. W. Sparks & Co. was put in further jeopardy. The restraining order was granted ex-parte, without any bond securing the respondent against loss. It restrained *all* transactions of respondent and did not except transactions in the ordinary course of business (R. 90). A modification of this ex-parte injunction, allowing respondent to carry on transactions in the ordinary course of business, was later obtained upon respondent's application to the Chancery Court of New Jersey over the petitioner's objection and opposition.

It seems plain that the petition presented by petitioner to the bankruptcy court was for the purpose of allowing petitioner to jockey the litigation into a jurisdiction which he preferred and not for the purpose revealed in his papers. Although petitioner has contended and argues extensively in his brief that he is seeking to protect the jurisdiction of the bankruptcy court, yet, when he procured the injunction from the bankruptcy court prohibiting respondent's prosecution of its Pennsylvania suit, petitioner promptly proceeded to institute his plenary suit not in the bankruptcy court, but in the Chancery Court of the State of New Jersey (R. 36).

In spite of the oft-repeated charge contained in petitioner's brief that the institution of respondent's Pennsylvania suit was a "conspiracy" and "scheme" on the part of respondent, to deprive the bankruptcy court of its jurisdiction, because, as petitioner contends, "the trustee and referee • • • [were] pressing too hotly on the trail of All Continent" (petitioner's brief, p. 30), the dominant fact remains that the United States District Court for the Eastern District of Pennsylvania was the sole tribunal to which respondent was able to resort in order to establish its claim to ownership and possession of the J. W. Sparks & Co. account.

Criticism of Petitioner's Statement of the Case.

1.

In his statement of the case, petitioner uses facts not appearing upon the record presented to this Court at the time of the presentation of the petition for the writ of certiorari granted herein. To justify the inclusion of these additional facts at this time without leave of this Court

petitioner asserts that this Court may take judicial notice of matters appearing in its own records, citing:

Craemer v. *Washington State,* 168 U. S. 124;
Washington & Idaho Railroad v. *Cour d'Alene Ry.,* 160 U. S. 101;
Fritzlen v. *Boatmen's Bank,* 212 U. S. 364;
United States v. *California Cooperative Canneries,* 279 U. S. 553;
National Fire Insurance Co. v. *Thompson,* 281 U. S. 331.

An additional step is then taken to indicate that judicial notice is not limited to matters appearing of record in cases previously adjudicated, but notice has been taken as well of matters appearing in the record of a case pending before this Court, citing:

West Ohio Gas Co. v. *Public Utilities Commission of Ohio,* 294 U. S. 63.

With this citation of authority, petitioner justifies the inclusion of an ex parte pleading compiled to show facts which bear out petitioner's contentions in the instant proceeding (petitioner's brief, p. 2).

There are four objections to the inclusion of the facts in the "record" in the proceeding referred to as *Matter of Steelman,* which was filed simultaneously with the record in this case. *First,* in every one of the six cases cited to sustain petitioner's contentions, a complete transcript of record relating to facts alleged by all parties to support their legal conclusions was before the court, the cases then being docketed in this Court, either as the result of a writ of error (*Craemer* v. *Washington State,* supra; *Washington & Idaho Railroad* v. *Cour d'Alene Ry.,* supra), writ of certiorari (*Fritzlen* v. *Boatmen's Bank,* supra; *National Fire Insurance Co.* v. *Thompson,* supra), by the entire

record being called up to this Court after certified questions had been lodged (*United States* v. *California Cooperative Canneries*, supra), or by appeal (*West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, supra).

In *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, supra, the record of which was examined by virtue of the doctrine of judicial notice, the case had not previously been adjudicated. However, an examination of that case will disclose that the record examined was that of a companion case, submitted with the *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* case, argued on the same day and decided on the same day, both cases being heard on appeal from judgments rendered together in a joint appeal (*West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, 128 Ohio St. 301).

Not one of these cases refers to an ex parte "record" made up at the pleasure of a petitioner in this Court.

Secondly, in no proper sense do the facts alleged in the petition in *Matter of Steelman* constitute a "record", the facts of which may be used to support a proposition of law. The petition is no more than a pleading in a cause. An ex parte pleading which the adversary has never been afforded an opportunity to answer cannot be used as a "record" of a case pending before this Court, as petitioner contends. The evil which would result from the use of the petition in *Matter of Steelman* as a record is clearly shown by its incompleteness. For example, the order to show cause and the restraining order of the Chancery Court of the State of New Jersey (R. 88-90) secured by the petitioner herein against the respondent herein is omitted, for, though an important fact in the chain of events, it evidently did not serve petitioner's purpose to include it in the petition in *Matter of Steelman*, as it would have controverted the allegations in paragraph 63

(2) of the said petition (*Matter of Steelman*, R. 31). So too, there are many instances whereby allegations in the petition in *Matter of Steelman* can definitely be disproved by reference to other facts and other proceedings which, of course, cannot, and should not be brought to the attention of this Court at this time.

Thirdly, the respondent, contrary to the assertion of petitioner (petitioner's brief, p. 26), has never been called upon nor had an opportunity to answer the petition for the writ of mandamus and/or writ of prohibition, entitled *Matter of Steelman*. No motion for leave to file the said petition has been granted. No order to show cause has issued from this Court to the Hon. GEORGE A. WELSH, and the District Court of the United States for the Eastern District of Pennsylvania. In addition, the respondent is not the proper party to controvert the facts alleged in the petition for the said writs. The proper procedure is outlined in 16 *Hughes, Federal Practice, Jurisdiction & Procedure*, § 18,143, page 471, as follows:

> "Motion for leave to file petition for writ of prohibition and/or a writ of mandamus accompanied by the petition and supporting brief is made in open court. After the court grants leave to file the petition, the case is docketed and the court enters an order directing the judges of the court below to show cause why the writ should not issue. The judges of the court below then file their return, and preferred hearing, after application to the court, may be had."

True it is, that the respondent opposed the application for a temporary restraining order and for a temporary injunction on petition for a writ of prohibition and/or a writ of mandamus. This procedure was adopted because the attorneys of record for respondent were formally served with the petition for a temporary restraining order

and for a temporary injunction on January 9, 1937, at which time they were formally notified of the application to be made to the Honorable BENJAMIN N. CARDOZO on Monday, January 11, 1937, for the temporary restraining order and for the temporary injunction; they appeared and took part in the discussion of that application and were granted leave at that time to file any answer to that application for temporary relief which they deemed pertinent. At no time were they called upon either to answer the petition for the writ of prohibition and/or writ of mandamus or to controvert any of the assertions therein. Consequently, it would be an injustice to the respondent if this Court took judicial notice of the ex parte "record" in *Matter of Steelman*, which stands uncontroverted because the proper time and opportunity to answer the said petition has not yet arrived.

Fourthly, Matter of Steelman is not pending before the Court since the motion for leave to file the petition has not been granted. It is not until the motion is granted that the case is docketed (16 *Hughes, Federal Practice, Jurisdiction & Procedure*, § 18,143, p. 471).

2.

The petitioner's statement of the case also asserts that objections were raised to the respondent's proof of claim, which was filed in the William Fox bankruptcy proceeding (petitioner's brief, p. 5). Nowhere in the record which was before the bankruptcy court, nor in the record before the Circuit Court of Appeals, is there one word to the effect that an objection has been filed to respondent's proof of claim. Petitioner, at page 36 of his brief, admits that he has filed no objection to the claim of the respondent.

While this Court may receive and consider as an addition to the facts stated in the record before it *supervening*

matters occurring subsequent to the rendering of the decree of the bankruptcy court, dated October 7, 1936 (R. 31) (*Patterson* v. *Alabama*, 294 U. S. 600, 607; *National Surety Co.* v. *Coriell*, 289 U. S. 426), the Court may not permit the inclusion of facts arising *prior* to the petition of the trustee in bankruptcy (petitioner herein), to the bankruptcy court, dated September 21, 1936 (R. 2). Facts which then existed must be found in the petition (R. 2).

The only objection which was raised to the proof of claim of the respondent occurred on June 19, 1936, when a creditor voiced an objection at the first meeting of creditors held for the election of a trustee. If any issue is deemed to have been raised by an objection by a creditor (and it will be demonstrated in the ensuing argument that none was), such an issue, or the facts pertaining thereto, should have been included in the petition of the petitioner dated September 21, 1936 (R. 2), if petitioner intended to rely thereon.

Moreover, the fact that the objection of a creditor constitutes the foundation of an issue as to the identity of the respondent and the bankrupt was not raised previously to the petition for certiorari. It was not in the record before the bankruptcy court; it was not in the record before the Circuit Court of Appeals. Nor was any question submitted to either court relating to a possible joinder of issue because of a creditor's objection to the respondent's claim. This Court has held that it would not consider a point not raised prior to the petition for certiorari (*Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380).

3.

Petitioner's brief presents two questions for the consideration of the Court at this time, the first question referring to the decision of the Circuit Court of Appeals and the second question referring to the dicta in the opinion of the Circuit Court of Appeals. On the other

hand, there was but a single question presented in the petition for the writ of certiorari granted herein, which is quoted in full at pages 1-2, supra.

It is respectfully submitted that "the only question for consideration is that stated in the petition for the writ of certiorari. Gunning v. Cooley, 281 U. S. 90, 98." (*Helvering* v. *Taylor*, 293 U. S. 507, 511.) Therefore, there is but one question before this Court, viz, the decision of the Circuit Court of Appeals. There is no question before this Court as to dicta contained in its opinion.

Summary of Argument.

I. The bankruptcy court did not have the power by injunction to restrain the Pennsylvania suit against the petitioner as that suit does not in any way impair or defeat the jurisdiction of the bankruptcy court.

1. The suit does not seek to reach or interfere with assets in the actual or constructive possession of the bankruptcy court.

2. The injunctive power of the bankruptcy court to restrain proceedings against a trustee in bankruptcy extends only to the protection of the assets in the actual or constructive possession of the bankruptcy court.

II. The District Court of the United States for the Eastern District of Pennsylvania acquired exclusive jurisdiction over the controversy therein.

III. The petitioner is a proper party defendant in the Pennsylvania suit.

IV. Dicta cannot be prejudicial to the petitioner.

ARGUMENT

POINT I

The bankruptcy court did not have the power by injunction to restrain the Pennsylvania suit against the petitioner as that suit does not in any way impair or defeat the jurisdiction of the bankruptcy court.

1. The suit does not seek to reach or interfere with assets in the actual or constructive possession of the bankruptcy court.

The shares of stock which constitute the *res* which give the District Court of the United States for the Eastern District of Pennsylvania jurisdiction over the suit commenced pursuant to § 57 of the Judicial Code are not and never were in the *actual* possession of the bankruptcy court. They are assets of the respondent, physically located within the Eastern District of Pennsylvania (R. 92), held by respondent's brokers, J. W. Sparks & Co. The assets were given into the possession of the said brokers pursuant to duly authorized agreements executed by respondent on January 7, 1936 (R. 96-99). The securities in the said account created by the respondent were accepted by the brokers as the property of the respondent (R. 93). No claim is made by petitioner that the bankrupt ever had possession of the securities which constitute the *res* in the Pennsylvania suit. Consequently, the bankruptcy court never obtained actual possession of these assets of the respondent, either at the date of the adjudication in bankruptcy of William Fox (May 29, 1936) (R. 3), or subsequent thereto.

Likewise, the assets of the respondent are not in the *constructive* possession of the bankruptcy court. (*Taubel-*

Scott-Kitzmiller Company, Inc. v. *Fox*, 264 U. S. 426, 432, 433, 438.)

In *In Re Dayton Coal & Iron Co.* (D. C. E. D. Tenn., 1922), 291 Fed. 390, the limitations of a bankruptcy court's constructive possession is stated as follows:

> "The custody, or constructive possession, of the debtor's property which is vested in the bankruptcy court by the filing of the petition, ex propria vigore, extends, however, only to the property then held by him or for him, of which the court might summarily take possession. See: *Orinoco Iron Co.* v. *Metzel* (6th Cir.), 230 Fed. 40, 44, 144 C. C. A. 338; 2 Rem. Bankcy. (2d Ed.), § 1807, p. 1692. And it does *not* extend to property otherwise held as to which an adverse claimant has a substantial pre-existing claim of lien or title, whose validity, in the absence of actual possession by the bankruptcy court, can only be determined in a plenary suit by the trustee in bankruptcy" (p. 396). (Italics ours.)

Likewise, in *Lynch* v. *Roberson* (C. C. A. 6, 1923), 287 Fed. 433, the Circuit Court of Appeals held:

> "• • • While the bankruptcy adjudication put in the custody of the bankruptcy court all the bankrupt's property, either actually or constructively in its possession, including property held not only by, but for, the bankrupt (In re Orinoco Corporation, supra), *it did not, as a matter of law, put into the custody of the bankruptcy court anything which the Coal Company then neither owned nor claimed title to*" (p. 438). (Italics ours.)

The law is well settled that:

> "Upon adjudication in bankruptcy, all the *property of the bankrupt* vests in the trustee as of the date of the filing of the petition. Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court's

possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. Gross v. Irving Trust Co., 289 U. S. 342, 344; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 307; In re Diamond's Estate, 259 Fed. 70, 73. This applies while the possession is constructive as well as when it becomes actual. Mueller v. Nugent, 184 U. S. 1, 14; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 432-433; Orinoco Iron Co. v. Metzel, 230 Fed. 40, 44-45, and cases cited." (*Taylor* v. *Sternberg*, 293 U. S. 470, at p. 472.) (Italics ours.)

The adjudication in bankruptcy, therefore, is a caveat to the world that the bankruptcy court has exclusive jurisdiction as to the *property of the bankrupt* from the date of the filing of the petition, May 29, 1936 (R. 3). This is stated in *In Re Smith* (D. C. S. D. Tex., 1924), 3 F. (2d) 40, aff. sub. nom. *Paynter* v. *Slator* (C. C. A. 5, 1925), 8 F. (2d) 1021, as follows:

"This caveat, however, does not extend to all property to which the bankrupt has title, but only to that of which he has possession also, as to which property the summary jurisdiction of the bankruptcy court is complete. *As to all property of the bankrupt not in his possession at the time of the bankruptcy, the doctrine of custodia legis does not extend, until by plenary suit it has been reduced to possession*" (p. 42 of 3 F. [2d]). (Italics ours.)

The securities involved in the Pennsylvania suit, "were not at any time and are not now [September 8, 1936] the property of the said William Fox, judgment-debtor, but on the contrary are now, and at all times were the property of the plaintiff [respondent herein]" (R. 22). Obviously, therefore, these securities never were reduced to possession by the petitioner. The first attempt to reduce them to possession was made on October 13, 1936, by

petitioner's plenary suit in the Chancery Court of the State of New Jersey (R. 36-55).

The commencement of this plenary suit is an admission by petitioner that the assets of the respondent are not within the constructive possession of the bankruptcy court. Had they been in the constructive possession of the bankruptcy court the petitioner could and would have commenced a summary proceeding to acquire possession of these assets of the respondent. A plenary suit is only necessary where the bankruptcy court has neither actual nor constructive possession.

Harrison v. *Chamberlin*, 271 U. S. 191;
Weidhorn v. *Levy*, 253 U. S. 268;
Fort Dearborn Trust & Savings Bank v. *Smalley* (C. C. A. 8, 1924), 298 Fed. 45.

2. The injunctive power of the bankruptcy court to restrain proceedings against a trustee in bankruptcy extends only to the protection of the assets in the actual or constructive possession of the bankruptcy court.

Since the assets involved in the Pennsylvania suit are not in the possession of the bankruptcy court, the bankruptcy court has no power to enjoin that suit against the petitioner, as trustee in bankruptcy, *in which suit no attempt is made to recover assets within the possession of the bankruptcy court.* This doctrine has oft been repeated under varying circumstances. The case analogous to the instant one is *Fort Dearborn Trust & Savings Bank* v. *Smalley* (C. C. A. 8, 1924), 298 Fed. 45. The bankruptcy court had summarily made an order enjoining the Fort Dearborn Trust & Savings Bank (hereinafter referred to as the "Bank") and one Forrey, who were trustees under a mortgage or deed of trust, from foreclosing that mortgage. The Bank and Forrey petitioned the Circuit Court

of Appeals to revise the order of the District Court, urging that the injunction was erroneous as a matter of law. The facts are briefly as follows:

In February of 1919, the Globe Company gave a mortgage in which the Bank and Forrey were made trustees. On February 17, 1920, the Globe Company contracted to sell the mortgaged property to one Skelly Company, which immediately took possession, and "was at all times after February 25, 1920, in the actual and exclusive possession of the property" (p. 50). On May 29, 1920, and on June 3, 1920, involuntary petitions in bankruptcy were filed against the Globe Company. On June 2, 1920, Skelly Company filed suit in the State District Court in Tulsa County, Oklahoma, against the Globe Company, as vendor, the Bank and Forrey, as the mortgage trustees, and others, for specific performance of the aforementioned contract of February 17, 1920. On June 29, 1920, the Globe Company was adjudicated a bankrupt upon the petition dated June 3, 1920. Prior to June 29, 1920, the Bank and Forrey, as trustees, filed an answer and cross-complaint in the State court suit, praying in the cross-complaint that the bankrupt's equity be foreclosed. *Without the consent, or leave of the bankruptcy court* (p. 49), the "cross-complaint brought in the trustees in bankruptcy as parties to the cause; and thereupon they initiated the proceedings which resulted in the injunctive order here complained of" (p. 47). The trustees in bankruptcy were made parties defendant by a summons issued out of the State court on the application of the Bank and Forrey. In answer to the contention of the trustees in bankruptcy that the State court suit should be enjoined, the Bank and Forrey asserted that the bankruptcy court was without jurisdiction, because the property was not, nor had it ever been at any time in the actual possession of the trustees in bankruptcy, the bankruptcy court or its agents nor was it

at the time of the filing of the petition in bankruptcy in the actual possession of the bankrupt or its agents; that it is in the actual possession of Skelly Company, which claims rights, title and interest therein adverse to the trustees in bankruptcy. The Bank and Forrey also asserted a second defense to the effect that the State court had jurisdiction over the subject matter, parties and res involved. The bankruptcy court overruled the plea to its jurisdiction and granted the injunction. In answer to the petition to revise, the trustees in bankruptcy alleged that the suit of Skelly Company in the State court was brought after the first petition in bankruptcy was filed, when no court, except the bankruptcy court had or could acquire jurisdiction over the assets of the bankrupt estate. Vacating the injunctive order and dismissing the petition of the trustee in bankruptcy, the Circuit Court of Appeals held:

> "• • • Nothing appears which discredits the claim that Skelly Co. was at all times after February 25, 1920, in the actual and exclusive possession of the property. The trustees under the mortgage offered to establish that as a fact by proof when they were brought into the Bankruptcy Court. Fort Dearborn Bank and Forrey as trustees were then adverse claimants. First National Bank v. Title & Trust Co., 198 U. S. 289, 291, 25 Sup. Ct. 693, 49 L. Ed. 1051; In re Rathman, 183 Fed. 913, 920, 921, 106 C. C. A. 253; Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 978, 142 C. C. A. 433. And before the Bankruptcy Court could deny them in a summary proceeding the right to apply the mortgaged property to the payment of the mortgage debt it was incumbent on the trustees in bankruptcy to establish that the bankrupt, or some one as its agent, had possession of the property at the time the petition in bankruptcy was filed, or that since then it had come into their possession or the possession of some other officer of that court. *The Bankruptcy Court could not take summary action until it had been so established* • • •" (p. 50).

"• • • A fair and reasonable estimate of the undisputed facts and the respective allegations as to possession at the time the petition in bankruptcy was filed requires, we think, a conclusion that Skelly Co. was and had been at all times, as claimed, in the actual possession of the property. However that may be, under denial of the claim of possession in the bankrupt made by the trustees in bankruptcy, it was their duty to establish that claim, and having failed to do so *the court was without power to make the order of December 5th*" (pp. 50, 51).

"• • • These are valuable rights, judicable in the State court, and when the cross-complaint was filed it was the duty of that court to ascertain them and enforce them; and the *Bankruptcy Court could not rightfully prevent their enforcement in that court, unless at that time it had within its custody and under its control the mortgaged property.* Hiscock v. Varick Bank, 206 U. S. 28, 41, 27 Sup. Ct. 681, 51 L. Ed. 945; Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; In re Rathman, supra; In re San Gabriel Sanatorium Co., 111 Fed. 892, 50 C. C. A. 56; Id. 102 Fed. 310, 42 C. C. A. 369; Duncan v. Girand (C. C. A.), 276 Fed. 554; In re Dayton Coal & Iron Co. (D. C.), 291 Fed. 390, 401; Murphy v. John Hofman Co., 211 U. S. 568, 569, 29 Sup. Ct. 154, 53 L. Ed. 327.

"We think it entirely clear on the facts presented that the Bankruptcy Court at no time had custody of the property, that it was never in the possession of that court, but that Skelly Co. was at all times after February 25, 1920, in possession, until it was taken over by the State court receiver. • • • *On the filing of the cross-complaint the State court obtained exclusive control of the property* for the purposes of foreclosure and sale. The issues required the State court to deal with the mortgaged property, to ascertain the amount of and enforce the admitted and existing lien against that property and to sell it in the exercise of its jurisdiction.

No other court had theretofore obtained possession of it and no other court could lawfully interfere with it in the exercise of its powers over the subject matter in litigation. Kline v. Burke Constr. Co., 260 U. S. 226, 43 Sup. [Ct.] 79, 67 L. Ed. 226, 24 A. L. R. 1077; Round City Co. v. Castleman, 187 Fed. 921, 924, 110 C. C. A. 55.

"The petition to revise is sustained, the injunctive order of December 5, 1922, will be vacated, and the petition of the trustees in bankruptcy on which that order was entered will be dismissed, all costs to be adjudged against the trustees in bankruptcy" (pp. 51, 52).

That the injunctive power of the bankruptcy court is limited to the protection of the assets within the possession of the bankruptcy court is demonstrated by the *ratio decidendi* of and statements in the following three cases:

In *Molina v. Murphy* (C. C. A. 1, 1934), 71 F. (2d) 605, the bankruptcy court granted an injunction against the appellant and others from proceeding with sales under a decree in a foreclosure suit upon the ex parte application of petitioner. The injunction, later modified, was appealed from and the principal question was,

"whether the bankruptcy court had jurisdiction to grant the injunction" (p. 606).

The Circuit Court of Appeals reversed the injunctive order on the ground that the bankruptcy court was without jurisdiction to enjoin the foreclosure proceedings because the property was in the possession of the receivers of the district court of San Juan at the time the extension proposal under § 74 of the Bankruptcy Act (Act of Cong., Mar. 3, 1933, c. 204, 47 Stat. 1467; 11 U. S. C. A., § 202) was filed. Since the property was not in the actual or constructive possession of the debtor or officer of the

bankruptcy court the Circuit Court of Appeals held the bankruptcy court was without power to enjoin either under § 74(n)(h) of the Bankruptcy Act (11 U. S. C. A., § 202[n][h] or *by reason of it having the same powers and jurisdiction as the bankruptcy court in the instant case*, pursuant to § 74(m) of the Bankruptcy Act (11 U. S. C. A., § 202[m]).

In *Petition of Schwartz* (C. C. A. 1, 1925), 7 F. (2d) 79, on petition to revise an injunction of the bankruptcy court which restrained an action for conversion, the Circuit Court of Appeals held that the bankruptcy court is without jurisdiction to enjoin the institution of a suit in a State court where such suit does not interfere with its possession, either actual or constructive, of the assets of the bankrupt.

Likewise, in *In re Adolf Gobel, Inc.* (C. C. A. 2, 1936), 80 F. (2d) 849, the Circuit Court of Appeals stated the rule as follows:

> "• • • In ordinary proceedings in bankruptcy, subdivision (15) of section 2 confers the power to enjoin the prosecution of an action in a state court *only* when the action interferes with *property* which is in the actual or constructive possession of the bankrupt at the date of the filing of the petition" (p. 852). (Italics ours.)

This rule has been applied in cases wherein a trustee in bankruptcy had been made a party defendant and he sought the aid of the bankruptcy court, praying for an injunction restraining the prosecution of the suit against him.

In *In re French* (D. C. W. D. Mich., 1927), 18 F. (2d) 792, the trustee in bankruptcy petitioned the bankruptcy court for an injunction against a suit brought against him

for conversion for wrongfully possessing himself of property of a person other than the bankrupt. Denying the injunction, the court stated:

> "Under this statute it has been held repeatedly that federal courts may enjoin proceedings pending in state courts relating to *possessory* rights in property being administered in the bankruptcy courts. See Hebert v. Crawford, 228 U. S. 204, 33 S. Ct. 484, 57 L. Ed. 800; Murphey v. John Hofman Co., 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327" (p. 793). (Italics the Court's.)

Since conversion is an action not involving a *res* within the possession of the bankruptcy court, the bankruptcy court held it was "*without jurisdiction to enjoin*" the action against the trustee in bankruptcy.

In a bankruptcy proceeding instituted soon after the effective date of the Bankruptcy Act of 1898, *In re Buntrock Clothing Co.* (D. C. N. D. Iowa, 1899), 92 Fed. 886, District Judge SHIRAS reviewed a referee's order compelling chattel mortgagees to turn over to the trustee in bankruptcy, on his summary application, mortgaged property, which "had passed into the possession of the mortgagees before the proceedings in bankruptcy were instituted" (p. 888). Judge SHIRAS held the mortgagees could not be compelled to yield up possession by orders entered in a summary proceeding. Thereafter the mortgagees commenced suit in the State court against the trustee in bankruptcy and the bankrupt to foreclose the chattel mortgage executed by the bankrupt. The trustee in bankruptcy then by bill in equity in the United States District Court sought to restrain the mortgagees from further prosecuting the State court suit against him (*Heath v. Shaffer* [D. C. N. D. Iowa, 1899], 93 Fed. 647). On application for a preliminary injunction, the facts developed in-

dicated that after the bankrupt executed the mortgage, and prior to the filing of the petition in bankruptcy, the defendant mortgagees took possession of the property, which possession they refused to yield to the trustee in bankruptcy. The prayer of the bill in equity is that the mortgage be declared to be fraudulent and void because it contravened the Bankruptcy Act and that the defendants be enjoined from prosecution of the foreclosure suit. Judge SHIRAS, denying the preliminary injunction, held:

> "Upon the face of the present bill, it appears that the mortgage complained of was executed, and *possession of the mortgaged property was taken, by the defendants herein, long previous to the filing of the petition in bankruptcy.* The mortgagees, desiring to foreclose the mortgage, brought suit to that end in the state court, *that being the only court in which they could institute foreclosure proceedings. The mortgaged property was not in possession of the trustee or of the court of bankruptcy, and the foreclosure proceedings were not brought for the purpose of taking the property away from the trustee, or from in any mode interfering with the control of any property in the actual custody of the court in bankruptcy;* and I can see no ground for holding that the state court was without jurisdiction to entertain the suit originally, or that the suit should be stayed by an injunction from this court" (pp. 650, 651). (Italics ours.)

In *In re Grissler* (C. C. A. 2, 1905), 136 Fed. 754, the trustee in bankruptcy of certain subcontractors was made a party defendant in a State court suit to enforce a mechanic's lien, which was commenced after the appointment of the said trustee in bankruptcy. The trustee in bankruptcy applied to the bankruptcy court for an injunction against the State court suit. The bankruptcy court granted the injunction which on appeal was reversed by the Circuit Court of Appeals which found no provision in

the Bankruptcy Act to stay such a suit in a case where property was not in the custody of the bankruptcy court.

In *In re J. M. Mertens & Co.* (C. C. A. 2, 1906), 147 Fed. 182, the bankruptcy court restrained the plaintiff in a State court action of trover brought against a trustee in bankruptcy. The Circuit Court of Appeals vacated the injunction.

In *In re Barber* (S. D. N. Y., 1934), 7 F. Supp. 806, the bankruptcy court refused to stay further prosecution of a State court action to enforce a mechanic's lien, the bankrupts being subcontractors, claimants of part of the fund involved in the State court action.

In *In re John Condon Contracting Co., Inc.* (E. D. N. Y., 1932), 1 F. Supp. 447, the bankruptcy court held that the assignee of certain highway contracts which were completed under an agreement with the bankrupt, a contractor, might commence and maintain a suit to foreclose a lien in the State court, and might join the trustee in bankruptcy as a defendant. The court there said:

> "*The fund in question is not in the bankruptcy court*, and consequently decisions holding that the foreclosure of a mortgage covering property to which the trustee in bankruptcy holds title should not be permitted to proceed, except in the bankruptcy court, seem not to be in point.
>
> "The trustee has no present title to the funds in the hands of the state comptroller, nor are they in his custody; therefore the award of these funds can properly proceed from adjudication in a plenary suit only" (pp. 447, 448).

After reargument (2 F. Supp. 52) the bankruptcy court modified its decision, holding that the trustee in bankruptcy (over his objection) be made a party defendant

in a State court action to foreclose a lien upon the fund, commenced after the filing of the involuntary petition in bankruptcy, and in which the assignee alleged he was entitled to affirmative relief against the trustee.

Respondent has found only one determination of this Court pertinent to the instant case. In *Hebert* v. *Crawford*, 228 U. S. 204, a State court suit against a trustee in bankruptcy was commenced after the bankruptcy proceedings were instituted. This suit was to recover from the trustee in bankruptcy money received by him with notice that it was taken from the plaintiff's bank account in violation of a State court injunction order in an equity suit commenced after the bankruptcy proceedings were started. This Court held that the State court had properly acquired jurisdiction over the trustee in bankruptcy because the money "paid and held did not thereby become a part of the *res* within the exclusive control of the bankrupt court" (p. 210). Therefore, *the bankruptcy court's injunction was reversed in so far as it enjoined the plaintiff in the State court action from suing the trustee in bankruptcy as to assets not within the possession of the bankruptcy court.*

Respondent does not disagree with those generalizations set forth in Point I of petitioner's brief which refer to cases in which the bankruptcy court had possession of the *res*. However, the rationale of the cases cited above, in which the *res* is not within the possession of the bankruptcy court, constitutes a specific limitation upon the generalizations quoted by the petitioner. We may admit, therefore, for the sake of argument, that if the *res* were in the possession of the bankruptcy court, then that court has "power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction", as stated in *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S.

648, 675. This case can readily be distinguished from the instant one for the following reasons:

(1) In the *Continental Illinois Bank* case, under § 77 of the Bankruptcy Act (Act of Cong., Mar. 3, 1933, c. 204, § 77, 47 Stat. 1474; 11 U. S. C. A. § 205), the court by express provision of the statute was given exclusive jurisdiction of the debtor's "property wherever located" (p. 662) and the *res* involved was one in which the debtor admittedly had a "property interest" (p. 681).

(2) This Court specifically limited its decision to proceedings under § 77 of the Bankruptcy Act (11 U. S. C. A. § 205) which was "not an ordinary proceeding in bankruptcy" and stated it was unnecessary to express an opinion as to the bankruptcy court's power to issue injunctions in an "ordinary bankruptcy proceeding" (p. 676).

(3) There, "no adverse claim was brought forward by either of the parties to the controversy" (p. 675). In such a case, it is clear that the bankruptcy court had summary power to enjoin interference with the *res*.

Petitioner lists cases to indicate that the bankruptcy court has power to restrain the sale, removal or other disposition of property in the possession of adverse claimants. There is no issue as to that proposition involved herein. Petitioner has applied that rule in the plenary suit, commenced by his bill of complaint and the affidavit in the Chancery Court of New Jersey (R. 36-88), where, on application, petitioner obtained a restraining order (R. 88-90), which is still in full force and effect, except as subsequently modified, only as to respondent. The respondent has not challenged this injunctive power.

Petitioner, in his brief at pages 21 and 22, discussing the difference between "substantial" and "merely colorable" adverse claims, quotes from *Harrison* v. *Chamberlin*, 271 U. S. 191, and urges that, "It follows that the trustee must make a 'preliminary inquiry' in order to ascertain of which character the adverse claim is. The making of this inquiry must be protected, if necessary, by injunction • • •" (p. 22).

Petitioner misinterprets the rule of *Harrison* v. *Chamberlin* (supra) when he states that it is for the petitioner to make the "preliminary inquiry". The "preliminary inquiry" is not that of the trustee in bankruptcy, but that of the bankruptcy court at the beginning of a summary proceeding (commenced by the trustee in bankruptcy to recover assets alleged to be the property of the bankrupt), wherein the defense is no jurisdiction, because of a substantial adverse claim. This is found at page 194 of 271 U. S., as follows:

> "However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the *court* may enter upon a *preliminary inquiry* to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the Court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding." (Italics ours.)

That case, therefore, stands for the well recognized proposition that "the District Court had jurisdiction to determine whether it could or could not proceed further. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Mueller* v. *Nugent*, 184 U. S. 1; *Schweer* v. *Brown*, 195 U. S. 171"

(*First National Bank of Chicago* v. *Chicago Title and Trust Company*, 198 U. S. 280, 291).

Thus, the quotation on page 22 of petitioner's brief, from *In re Norris* (W. D. N. Y., 1910), 177 Fed. 598, correctly states the proposition, but this does not mean that the trustee makes the preliminary inquiry in examinations, pursuant to § 21(a) of the Bankruptcy Act.

The fact that petitioner concluded, without resorting to a summary proceeding in the bankruptcy court, that a plenary suit was necessary as evidenced by the institution of his plenary suit in the Chancery Court of New Jersey (R. 36), establishes that the adverse claim of the respondent was not colorable. If petitioner had had any doubt, he would have applied for a summary order to test the substantiality of the respondent's adverse claim.

Petitioner, relying on *Local Loan Co.* v. *Hunt*, 292 U. S. 234, states that the bankruptcy court may restrain prosecution by creditors or adverse claimants of litigation in courts outside of the bankruptcy court, "when it is made to appear that such litigation either will interfere with the administration of the bankruptcy proceedings in the bankruptcy court or will substantially and practically frustrate the purpose of the bankruptcy proceedings" (petitioner's brief, p. 22). In the *Local Loan Co.* case, supra, there were no bankruptcy proceedings pending. It does not involve the administration of a bankrupt's estate. The bankrupt had received his discharge. It was that order of discharge, a decree of the bankruptcy court, which this Court held could be protected from subsequent litigation (which would nullify the bankruptcy court's decree) because of the general rule that any court may protect its own decrees and judgments by ancillary proceedings for an injunction.

Petitioner, at pages 24 and 25 of his brief, cites a number of cases wherein the lower courts have enjoined collateral litigation of bankruptcy proceedings outside the bankruptcy court. In *In re Trayna & Cohn* (C. C. A. 2, 1912), 195 Fed. 486, the *res* was in the possession of the bankruptcy court as part of the bankrupt's estate. In a later case, within the same circuit, *In re Polok* (S. D. N. Y., 1931), 55 F. (2d) 417, a motion of a trustee in bankruptcy to stay the prosecution of a conversion action against him then pending in the State court was denied and *In re Trayna & Cohn,* supra, distinguished on the ground that in the latter case the plaintiff in the State court action had consented to a consideration of title by the bankruptcy court and then later sought to raise the same questions in the State court action. Again, it is manifest that actions against trustees in bankruptcy in courts other than the bankruptcy court, which do not involve the *res* in the possession of the bankruptcy court, are not enjoined.

In none of the remaining four cases cited by petitioner, at pages 24 and 25, is there involved the question of the bankruptcy court's power to enjoin a suit against a trustee in bankruptcy in a court other than the bankruptcy court.

The rationale of all the cases heretofore cited is that *the bankruptcy court is without power to enjoin actions against trustees in bankruptcy, relating to the rights of the said trustees, but not involving assets in the possession of the bankruptcy court,* notwithstanding its power to enjoin proceedings against trustees in bankruptcy which interfere with assets within the possession of the bankruptcy court.

POINT II

The District Court of the United States for the Eastern District of Pennsylvania acquired exclusive jurisdiction over the controversy therein.

Certificates of stock are property within the meaning of § 57 of the Judicial Code and constitute the *res* in the jurisdiction wherein the certificates are located.

Franz v. *Franz* (C. C. A. 8, 1926), 15 F. (2d) 797, certiorari denied, 273 U. S. 756;

Beal v. *Carpenter* (C. C. A. 8, 1916), 235 Fed. 273;

Blake v. *Foreman Bros. Banking Co.* (N. D. Ill., 1914), 218 Fed. 264;

Merritt v. *American Steel-Barge Co.* (C. C. A. 8, 1897), 79 Fed. 228.

An action commenced pursuant to § 57 of the Judicial Code is in the nature of an action in rem as it "involves the potential necessity of assuming control of that property for the purpose of enforcing any decree that may be rendered, and of preventing any disposition of the property that may impair the efficacy of that decree" (*Franz* v. *Franz,* supra, at p. 801).

The suit in the Chancery Court of New Jersey is likewise a suit quasi *in rem* which seeks a determination of the ownership of the assets of the respondent, for the petitioner in that suit seeks the appointment of a receiver (R. 54), sought and procured an *ex parte* injunction against any transfer of the assets of respondent by its officers (R. 88).

Thus, there are two suits *in rem* relating to the assets of the respondent. The Pennsylvania suit was commenced

on September 8, 1936 (R. 16); thereafter, the Chancery suit was commenced on October 13, 1936 (R. 88).

> "If two suits are in *rem* or *quasi in rem*, so that the court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other." (*United States* v. *Bank of New York and Trust Company*, 296 U. S. 463, 477.)

The jurisdiction of the court in which the suit was first brought is paramount to that of any other court.

> *Penn General Casualty Company* v. *Pennsylvania*, 294 U. S. 189, 197;
> *Harkin* v. *Brundage*, 276 U. S. 36, 43;
> *Palmer* v. *Texas*, 212 U. S. 118, 129;
> *Farmers Loan and Trust Company* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51, 61.

In *Penn General Casualty Company* v. *Pennsylvania*, 294 U. S. 189, the general and frequently expressed rule as to the exclusiveness of jurisdiction was set forth as follows:

> "Where the judgment is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other. See *Buck* v. *Colbath*, supra [3 Wall. 334], 342; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, and cases cited at pages 230-231. But if the two suits are *in rem* or quasi *in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the juris-

> diction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system, see *Peck* v. *Jenness*, 7 How. 612, 625; *Taylor* v. *Carryl*, 20 How. 583, 595; *Freeman* v. *Howe*, 24 How. 450, 459; *Buck* v. *Colbath*, supra, 341; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, supra [177 U. S. 51], 61, and to protect the judicial processes of the court first assuming jurisdiction, *Wabash R. Co.* v. *Adelbert College*, supra [208 U. S. 38], 54; *Palmer* v. *Texas*, 212 U. S. 118, 129, 130, the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction **over the property** may maintain and exercise that jurisdiction to the exclusion of the other" (p. 195). (Italics the Court's; emphasis ours.)

Since the Pennsylvania suit was instituted prior to the Chancery suit, it is the Pennsylvania District Court and not the Chancery Court which has paramount jurisdiction of the issue as to the ownership of the assets constituting the J. W. Sparks account. The only manner in which the paramount jurisdiction as to this issue in the Pennsylvania District Court could be attacked would be if the bankruptcy court had acquired *in rem* jurisdiction as to the assets involved prior to the commencement of the Pennsylvania suit on September 8, 1936 (R. 16). The protection of the paramount and exclusive jurisdiction of a bankruptcy court is no more sacred than the protection of the paramount and exclusive jurisdiction of any other court, Federal or State. There is nothing sacrosanct about the jurisdiction of a bankruptcy court. The exclusive jurisdiction of the bankruptcy court is merely an application of the general rule concerning *in rem* actions. (*Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568, 569; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 738.)

Therefore, the proposition before this Court to be determined is whether or not the bankruptcy court as distinguished from the Court of Chancery of New Jersey, acquired exclusive jurisdiction over the controversy relating to the assets of the respondent prior to the commencement of the Pennsylvania suit. If the bankruptcy court did not acquire *in rem* jurisdiction over the assets of the respondent, then clearly, the District Court of the United States for the Eastern District of Pennsylvania did acquire such paramount and exclusive jurisdiction which is entitled to protection by this Court.

The Circuit Court of Appeals, realizing this situation in which proceedings were pending in three courts, held that the bankruptcy court had no power to enjoin the Pennsylvania suit as against the petitioner (R. 106), and stated the general rule that exclusive jurisdiction as to the assets in an *in rem* proceeding is given to the first court in which an *in rem* proceeding is commenced (R. 105).

The bankruptcy court does not have jurisdiction over the assets which petitioner claims belong to the bankrupt estate when such assets are in the actual possession of an adverse claimant and not in the actual or constructive possession of the petitioner or the bankruptcy court. In the recent case of *Southwestern Lumber Co. of New Jersey* v. *Kerr* (S. D. Texas, 1934), 11 F. Supp. 253, a suit in equity was commenced by a pledgee of collateral security (shares of stock) against the trustee in bankruptcy of the pledgor, to require the trustee in bankruptcy "to set up in this cause any rights he may have" and to enjoin the said trustee in bankruptcy from instituting suits in other courts respecting the matter and "for such order, orders or decrees" to prevent the trustee from interfering with and preventing the pledgee from selling the collateral (11 F. Supp. 253, 255). The trustee in bankruptcy contended, "that this court is without juris-

diction to entertain the plaintiff's suit, and that jurisdiction is exclusively in the bankruptcy court in this district [in which the bankrupt had been adjudicated upon his voluntary petition]." (11 F. Supp. 253, 256.)

The District Court found:

> "(g) All of the stock certificates were indorsed by Kirby [the bankrupt pledgor], and delivered on the dates of the respective pledge agreements, to plaintiff, *and have since been in the actual physical possession and custody of plaintiff, and not in the actual nor constructive possession of either Kirby, or defendant, his trustee.* The stock was not transferred to plaintiff on the stock transfer books of [the Kirby] lumber company." (11 F. Supp. 253, 258.) (Italics the Court's.)

The District Court held:

> "The foregoing discussion is upon the finding and conclusion that the bankruptcy court and defendant, its trustee, have *neither actual nor constructive possession of the stock.* • • •
>
> "I think, however, there is no escape from the conclusion that plaintiff, and not the bankruptcy court, has possession of the stock, and that this court properly took jurisdiction of plaintiff's bill when filed, and has jurisdiction now. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770; In re Hudson River Nav. Corp., supra [(C. C. A.) 57 F. (2d) 175]; In re Greenbaum & Sons (D. C.), 6 F. Supp. 245." (11 F. Supp. 253, 259.) (Italics the Court's.)

On the merits the District Court granted to plaintiff the relief prayed for. On appeal the judgment of the District Court was affirmed (*Kerr* v. *Southwestern Lumber Co. of New Jersey* [C. C. A. 5, 1935], 78 F. [2d] 348). This Court denied certiorari, 296 U. S. 611.

Thus the bankruptcy court has no power to interfere with the United States District Court for the Eastern District of Pennsylvania (a Federal court sitting as a court of equity), which has acquired jurisdiction over the controversy, the parties and the res.

The petitioner's petition to the bankruptcy court (R. 2) in which he sought to restrain the prosecution of the Pennsylvania suit, is devoid of any reference that up to that time, there was any *issue* in the bankruptcy court as to the identity of the bankrupt and the respondent or any *issue* as to the ownership of respondent's assets in the J. W. Sparks account.

Now, upon certiorari for the first time petitioner urges that even before he instituted his suit in the Chancery Court of New Jersey, an issue had been raised as to the identity of the bankrupt and the respondent. This he claims resulted from the filing by respondent of its proof of claim in the bankruptcy, and because at the time that the trustee was being elected at the first meeting of creditors, Capital Company, one of the creditors, objected to this claim of the respondent.

Petitioner's contention is untenable:

Nowhere in the transcript of record is there a single reference to this alleged issue having been raised in the bankruptcy court prior to the Chancery suit. Petitioner refers to the "record" in *Matter of Steelman* for these alleged facts. As has already been demonstrated, the matters contained in this ex parte pleading cannot be considered by this Court (see pp. 12-16, supra). This is especially true, since the facts to which petitioner desires to make reference occurred *prior* to September 21, 1936, when the petitioner swore to his affidavit (R. 16) in the bankruptcy court in support of his petition to restrain the prosecution of the Pennsylvania suit.

In note 20 on page 45 of petitioner's brief, he refers to certain stenographic minutes of the meeting of creditors held on June 19, 1936, and states that the minutes of this meeting were before the bankruptcy court when it granted the injunction herein, but were not incorporated by respondent in its record on appeal to the Circuit Court of Appeals. Petitioner thus seeks to have this Court take into consideration the facts alleged to be shown in the said stenographic minutes.

Neither these stenographic minutes nor any other stenographic minutes were before the bankruptcy court *upon petitioner's application for an injunction.* There is no reference to such stenographic minutes in (a) the trustee's petition (R. 2), (b) the trustee's affidavit (R. 9) attached to said petition, or (c) the decree granting petitioner's application for injunction (R. 31).

There is contained in the opinion of the bankruptcy court an allusion to stenographic minutes (R. 30). The bankruptcy court did not state in its opinion that the stenographic minutes were before it or had been considered by it. Certain stenographic minutes were before the bankruptcy court at the time, having been presented to it, not upon the petitioner's application for the injunction, but in connection with a different application then *sub judice* before the bankruptcy court in the bankruptcy proceedings. *In re Fox,* 16 F. Supp. 950. These stenographic minutes which were in the possession of the bankruptcy court on the other application referred to were *minutes of the § 21(a) examinations.* **The minutes of the first meeting of creditors,** in which the facts appear which are alleged to have created the issue, are contained in a separate volume and never were presented to the bankruptcy court in connection with petitioner's application for an injunction, or upon any other application before that court.

Since this contention of the petitioner was never raised in the bankruptcy court or in the Circuit Court of Appeals, it follows, as a matter of established procedure in this Court, that that contention cannot now be considered upon the argument in this Court. This Court has held that it will not consider points raised for the first time on certiorari (*Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380).

However, if this new point advanced by petitioner should be considered although predicated upon matters outside of the record, the references made by petitioner do not bear out his contention. To meet his argument respondent begs leave of this Court to refer to facts which are likewise outside the record, as this is respondent's only means of controverting petitioner's contention. He urges that at the first meeting of creditors on June 19, 1936, Capital Company objected to the claim filed by the respondent. The purpose of that first meeting was, of course, to elect a trustee. Every creditor's claim was at that time objected to by one or another creditor. Just as the Capital Company had objected to the claim of the respondent, so other creditors objected to the claim of the Capital Company, in an endeavor to defeat its right to vote for a trustee. However, that did not raise an issue as to the petitioner's contention that respondent is merely the alter ego of the bankrupt. The statement made by counsel for the Capital Company, reference to which is made at page 45 of petitioner's brief, contains an admission that respondent was wholly owned by the bankrupt's wife, viz:

> "The All Continent Corporation is wholly owned by the wife of the bankrupt, and its officers and directors are all members of the family or employees of the bankrupt."

This did not create an issue. On the contrary, it is a concession that respondent's assets do not belong to the bankrupt, but that they are the property of bankrupt's wife, who owns all of the capital stock of respondent.

Comment has already been made that in petitioner's petition, dated September 21, 1936, there is not the slightest reference to any such issue. In petitioner's brief, at page 36, he admits without qualification, that he has not filed any objections to respondent's proof of claim.

At pages 30 and 31 of petitioner's brief, he states that

> "The controversy between the trustee and All Continent as to the identity between All Continent and the bankrupt was presented to the bankruptcy court by (a) the filing of a proof of claim by All Continent, and (b) the conduct of examinations under § 21(a), which resulted in a referee's order directing the production of All Continent's books for audit along with those of the bankrupt, and a referee's report which strongly indicated the validity of the trustee's contention that All Continent is simply the *alter ego* of the bankrupt."

No such contention was made by petitioner when he applied for a summary order to compel respondent to turn over its books to petitioner for audit. On the contrary, petitioner's counsel stated on August 12, 1936, at the hearing before the referee on this application that there was no such issue. He said:

> "We are not asking your Honor to consider that All Continent is the bankrupt, or his alter ego. We are not asking your Honor to determine at this time, that the books of the All Continent Corporation are in reality, the books of Fox. We are, at the present moment, treating All Continent corporation as a separate entity; as one having had business transactions with the bankrupt over the period from its very inception, until now, and the

corporation which ultimately acquired the entire wealth of the bankrupt. * * *

"*Now, the question as to whether or not these are the books of All Continent Corporation; the question as to whether or not All Continent Corporation is a separate entity and a third party from the bankrupt, is not before you. That issue is not here raised.*" (Stenographic minutes on Referee's hearing on order to show cause, August 12, 1936, pp. 56, 57.) (Italics ours.)

The act of filing a claim in a bankruptcy court does not give that court jurisdiction over the claimant as to every issue that might possibly arise between claimant and trustee in bankruptcy. (*Daniel* v. *Guaranty Trust Co.*, 285 U. S. 154, 162.)

In *Edward Finch Co.* v. *Robie* (C. C. A. 8, 1926), 12 F. (2d) 360, cited at page 32 of petitioner's brief, issue was joined by the filing of written objections to the creditor's proof of claim by the trustee.

Even if an issue had been created by the objections filed by Capital Company at the first meeting of creditors, it necessarily must have been an issue *in personam*, did not refer to any specific *res*, nor is it contended by petitioner that any issue was raised in an *in rem* proceeding. Therefore, the pendency of that issue in the bankruptcy court could not have in any wise affected the right of the respondent to proceed with the *in rem* action which it instituted in Pennsylvania. (See *Penn General Casualty Company* v. *Pennsylvania*, 294 U. S. 189, 195.)

When is an issue made in relation to claims in bankruptcy? "An issue is a matter affirmed on one side and denied on the other." (*The Tordenskjold* [W. D. Wash., 1931], 53 F. [2d] 266, 267.) An issue is made when formal objections to a creditor's proof of claim are filed by a trustee in bankruptcy.

In *In re Noble* (W. D. N. Y., 1936), 15 F. Supp. 648, the referee in bankruptcy, on order to show cause on the application of the trustee in bankruptcy ordered two claimants (United States Government tax officials) to file a bill of particulars as to their respective claims. No objections had been filed by the trustee in bankruptcy to the allowance of each claim. Reversing the order of the referee, the bankruptcy court held:

> "• • • The ends of justice here especially require that the government should not be required to disclose the details of its evidence in support of the claims pending the filing of formal objections, at least, or *the trial of the issue raised by such objections* • • • " (p. 650). (Italics ours.)

In *In re Steinreich Associates, Inc.* (C. C. A. 2, 1936), 83 F. (2d) 740, the majority opinion stated: "Issue had been joined on the question of preferences • • • " (p. 741). In the dissenting opinion MANTON, C. J., stated the rule, uncontroverted by the majority, as to when issue is joined:

> "In the instant case, the claimant did not raise the issue of preference by filing his claim. The trustee's objections first raised that point" (p. 742).

Thus, it is clear that no issue concerning the identity of the respondent and the bankrupt was in the bankruptcy court prior to the commencement of the Pennsylvania suit. The fact that the claim had been filed and the further fact that examinations under § 21(a) of the Bankruptcy Act were conducted and the conclusion of the referee on a motion to have the respondent's books turned over to the petitioner for audit and examination, did not in any way create an issue within the judicially established meaning of that word.

Petitioner in Point II asserts that the facts in the petition before the bankruptcy court (R. 2) must be

deemed admitted by respondent's motion to dismiss the petition (R. 28).

"A motion to dismiss, like a demurrer, admits only facts well pleaded." (*Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 185; *Arizona* v. *California*, 283 U. S. 423, 452.) On the other hand, conclusions, "• • • of the pleader, not being well-pleaded ultimate facts, are not held against the party interposing the demurrer, but are disregarded." (*Bishop & Co., Inc.* v. *Midland Bank* [C. C. A. 9, 1936], 84 F. [2d] 585, 587, certiorari denied, 299 U. S. —, 57 S. Ct. 111.)

The petition (R. 2) contains much "by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25, 43. *Southern Ry. Co.* v. *King*, 217 U. S. 524, 536. *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 500." (*Missouri Pacific Railroad Co.* v. *Norwood*, 283 U. S. 249, 254.)

In *Equitable Life Assurance Society of the United States* v. *Brown*, 213 U. S. 25, this Court held:

> "As the questions in this case arise upon the defendant's demurrer to the bill of complaint, it is necessary to direct attention to the effect of a demurrer as an admission. We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. *It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill*, as, for instance, in regard to the probable effect in the future of the continued control of the defendant by the interests existing therein up to 1906. Hence any construction placed by complainant upon the charter of the defendant and the insurance policy issued by the defendant to the complainant is not admitted, nor is the allegation of the ownership of the surplus by

> the policy holders as alleged by the complainant, nor any opinion which is expressed in the bill as to the ability of the defendant to continue business, *nor is any other opinion as to future happenings admitted by the demurrer*" (p. 43). (Italics ours.)

Therefore this Court should disregard all but actual facts appearing in the petition (R. 2).

In the recent case of *Foust* v. *Munson Steamship Lines*, 299 U. S. 77, in which a trustee in bankruptcy in a reorganization proceeding had successfully restrained a party from bringing an action at law pending proceedings under § 77B of the Bankruptcy Act (Act of Cong., June 6, 1934, c. 424, § 77B, 48 Stat. 912; 11 U. S. C. A. § 207), this Court, vacating the injunction order, held:

> "The burden of frank disclosure was upon the debtor and trustees. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 244. *Cf.* 2 High on Injunctions, 4th ed., § 1474." (299 U. S. 77, 86.)

This Court has also held:

> "Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist." (*Lambert Run Coal Company* v. *Baltimore & Ohio Railroad Company*, 258 U. S. 377, at p. 382.)

The sole basis for the injunctive order obtained by petitioner from the bankruptcy court, was the claim that he was not ready, and could not be ready for a protracted period thereafter, to institute a plenary suit; that he was not ready and could not be ready to contest the question of ownership and the right to possession raised in the Pennsylvania suit. In his petition to the bankruptcy court he alleged:

> "15. By virtue of the proceedings last mentioned above, said All Continent Corporation is endeavor-

ing to force the trial of the issue of the ownership of property standing in its name concerning the real, true and bona fide ownership of which examination and investigation is now being made in orderly procedure under said Section 21-a of said Bankruptcy Act, by virtue of permission and leave granted by said order entered in this cause as aforesaid. To permit said All Continent Corporation to proceed with said litigation before said investigation and examination under Section 21-a of said Bankruptcy Act is concluded would require petitioner herein to enter upon the trial of the question of the ownership of the property and assets mentioned in said bill of complaint, copy of which is attached hereto, without such knowledge and information as might be gleaned from the orderly continuance of said 21-a examination and a complete examination and audit of the books of All Continent Corporation. From the facts and information which has come to the knowledge of the petitioner, he is strongly of the belief and opinion that All Continent Corporation and the bankrupt, William Fox, are one and the same, and he confidently believes that if the examination and investigation which is now being conducted under said Section 21-a of the Bankruptcy Act, as aforesaid, is permitted to proceed unhampered and unobstructed by the unlawful and improper acts and conduct of those persons subpoenaed to appear before this Court for examination, then it will be definitely and conclusively determined that said All Continent Corporation and said bankrupt William Fox are one and the same" (R. 7, 8).

The basis for obtaining the injunctive order against respondent was untrue because within one week after the making of the order and before the conclusion of the examinations under § 21(a) of the Bankruptcy Act there was served upon the respondent the bill of complaint in the plenary suit in the Chancery Court of the State of

New Jersey (R. 36). The length and detail of the bill of complaint (R. 36-66), the affidavit (R. 66-88), and the order to show cause (R. 88-90) served therewith, and the data contained therein, added to the fact that a petition for consent of the referee in bankruptcy had been submitted to the said referee (R. 36) and an order obtained on October 13, 1936 (R. 36), approving the commencement of the said plenary suit, make it all too clear that the sole ground upon which the injunction was asked, was not and could not be true and that petitioner did not disclose his true reasons to the bankruptcy court. Judging by the volume of the papers served in this plenary suit, it is a compelling inference that the papers were actually in the course of preparation at the time petitioner's plea was made to the bankruptcy court. Petitioner's claim that he could not proceed until the completion of the § 21(a) examination is, to say the least, a distortion of the facts as evidenced by his own subsequent conduct, since the § 21(a) examinations have not yet been concluded.

On its face it is apparent that the petition presented to the bankruptcy court was a palpable device to circumvent the jurisdiction of the District Court for the Eastern District of Pennsylvania, and to interfere with its authority and power to determine the ownership of the *res* involved in that suit.

The Capital Company which is one of the two active creditors in this bankruptcy proceeding (R. 3), likewise contested the jurisdiction of the District Court for the Eastern District of Pennsylvania by a motion to set aside the service of process upon it (R. 100). It is clear that both the Capital Company and petitioner have attempted to prevent any adjudication of the merits in the Pennsylvania suit.

Respondent respectfully submits that petitioner did not frankly disclose all the facts to the bankruptcy court as he

was required to do (*Foust* v. *Munson Steamship Lines*, 299 U. S. 77, 86).

Had the petitioner informed the bankruptcy court that there was no issue in that court and had he shown that he was contemplating and preparing a bill of complaint and affidavit for a plenary suit against respondent to try the same issue that was already before the Pennsylvania court, the bankruptcy court would have seen immediately that it did not have power to enjoin the respondent herein. The Circuit Court of Appeals, on the other hand, having the full picture before it, was able to see what the petitioner had attempted to do. It held that in view of all the facts the bankruptcy court did not have power to enjoin (R. 106).

Petitioner claims at page 31 of his brief that if the admitted facts are insufficient to justify the injunction order (R. 31), "it must be because a bankruptcy court can never issue an injunction other than in protection of a specific property *res* in its possession." In this petitioner admits that the true rule is as submitted by the respondent; viz, that the bankruptcy court only has power to protect a *res* within its possession. He is herein attempting to have this Court extend the rule beyond its previous scope though he admits he knows "of no case in this Court directly in point" (petitioner's brief, p. 31) which would sanction a departure from this well-established rule.

The cases cited by petitioner do not in any way support his contention. Respondent does not dispute the holdings in *Meyers* v. *International Trust Company*, 263 U. S. 64, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, and *Whitney* v. *Wenman*, 198 U. S. 539. These cases are irrelevant.

The rule of *Meyers* v. *International Trust Company*, 263 U. S. 64, does not support petitioner's contention. The holding therein is that a fact determined by a referee in bankruptcy in "what was equivalent to a hearing in

equity" (p. 72) on an issue created by the filing of a specification pursuant to General Order XXXII, provided for by § 30 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 30, 30 Stat. 554, 11 U. S. C. A., § 53), in opposition to an application to confirm a composition, is binding on the parties actually litigating the issue. This is but an instance of a doctrine applied to all judicial proceedings. This rule of estoppel by judgment would likewise apply to any determination of the issues raised in the Pennsylvania suit. Furthermore, as in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, the bankruptcy court had *in rem* jurisdiction.

Bronx Brass Foundry Co. v. *Irving Trust Company*, 297 U. S. 230, does not stand for the proposition asserted by petitioner. It rests solely on the applicability of Equity Rule 2 of the United States District Court for the Southern District of New York, which, as applied by this Court to bankruptcy proceedings, prevents the withdrawal of a claim *after issue joined*. (Compare *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 21.) In the *Bronx Brass Foundry* case, supra, issue had been raised by the creditor's denial of the trustee's allegations of preference on a motion of the trustee to expunge the creditor's claim (297 U. S. 230, 231).

Respondent need not discuss the inapplicability of *Alexander* v. *Hillman*, 296 U. S. 222, because petitioner admits that § 68 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 68, 30 Stat. 544, 565, 11 U. S. C. A., § 108) does not permit the rule of *Alexander* v. *Hillman* to be pressed as far as petitioner would desire (petitioner's brief, p. 37). However, *Alexander* v. *Hillman* does not stand for the proposition that petitioner asserts, i.e., that "Under that rule, the mere filing of the claim would vest the bankruptcy court with jurisdiction over all issues between the claimant and the trustee" (petitioner's

brief, pp. 36, 37). On the contrary, the facts in that case disclose that the issue involved was raised by the affirmative step of the receiver who filed an ancillary bill against the claimant in which he sought affirmative relief (296 U. S. 222, 235, 238).

Likewise, in *In re Steinreich Associates, Inc.* (C. C. A. 2, 1936), 83 F. (2d) 740, cited by petitioner at page 35 of his brief, "Issue had been joined on the question of preferences • • • " (p. 741), by the filing of formal objections by the trustee.

Petitioner admits that he has "not yet filed his formal objection" (petitioner's brief, p. 36).

Finally, in support of his position, petitioner relies on *Continental Illinois Bank and Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, stating that this case appears to be determinative of the instant question. Respondent has heretofore distinguished the *Continental Bank* case from the instant one (see pp. 31-32, supra), and does not controvert the principle that the bankruptcy court has "power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction" but respectfully submits that petitioner in no way establishes that the bankruptcy court in the instant cause had jurisdiction of any *res* or *issue* sufficient to prevent the Pennsylvania suit against petitioner.

Petitioner's discussion of examinations pursuant to § 21(a) of the Bankruptcy Act indicates that he has misconstrued the nature of the proceedings before the referee. Such examinations are not proceedings in which issues of fact are tried. They are merely inquiries in which the creditors (R. 3) may examine persons as to matters pertinent to the bankruptcy proceedings. They involve no trial. Respondent has never had an opportunity to offer evidence in support of its position. Petitioner's conclusions from the evidence given at the § 21(a) exam-

inations seem to be that respondent "very likely has no interest at all" (petitioner's brief, p. 38) in the assets involved in the Pennsylvania suit, yet he never commenced a summary proceeding to get possession of the assets. The plenary suit commenced by the bill of complaint (R. 36) in the Chancery Court of New Jersey is evidence of the fallacy of petitioner's position. The only conclusion to be drawn from petitioner's bill of complaint (R. 36-47) is that the § 21(a) examinations established the substantiality of respondent's adverse claim.

At page 43 of his brief, petitioner states: "The trustee's plenary suit raised every issue between All Continent and the trustee." If this be so, respondent submits that the issues raised therein were raised *for the first time* in that plenary suit, and this a month after the Pennsylvania suit had been commenced.

At page 51 of his brief, petitioner deliberately ignores the true factual background in this case and attempts to convict an officer, and an employee of the respondent, of contempt of court before any District Judge has adjudged them in contempt. Respondent's president was cited for contempt (R. 6). However, *she has never been adjudged guilty of contempt.* Although the facts nowhere appear in the record and are only found in the brief of petitioner, after months of testifying, an employee of respondent was cited for contempt. *He, likewise, has never been adjudged in contempt.* Hence, it is respondent's duty to controvert the language of the petitioner when he says, at page 51 of his brief, "Once the officers of the respondent have ceased to be in contempt and have tendered their evidence and their books, • • •."

It is, of course, beyond the power of the referee to adjudge a witness in contempt, such power having been given by § 41(b) of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 41, 30 Stat. 556, 11 U. S. C. A.,

§ 69[b]) to the District Judge, and one which only the District Judge may exercise. As the District Judge has never adjudged either of the parties mentioned by petitioner to be in contempt, it is unfair and unwarranted for the petitioner to use the language he does.
~~tioner's brief, p. 37).~~

POINT III

The petitioner is a proper party defendant in the Pennsylvania suit.

Petitioner, at page 6 of his brief, mentions the fact that he was made a party defendant in the Pennsylvania suit without leave of the bankruptcy court. However, in no part of his brief does he cite any authority to the effect that leave of the bankruptcy court is a condition precedent to a suit properly instituted, in other respects, against a trustee in bankruptcy. Indeed, it would be impossible for him to do so in view of the state of authorities.

As the *res* is not within the control of the bankruptcy court and the Pennsylvania court has jurisdiction over it, the respondent properly joined the petitioner as a party defendant to cut off his rights (*Remington on Bankruptcy* [4th Ed.], Vol. 5, Sec. 2331, p. 477). Leave of the bankruptcy court is not requisite before joining the petitioner as a party defendant where affirmative relief is not sought against him (*Remington on Bankruptcy* [4th Ed.], Vol. 5, Sec. 2336, p. 486; *Fort Dearborn Trust & Savings Bank* v. *Smalley* [C. C. A. 8, 1924], 298 Fed. 45, 49; *In re Smith* [S. D. N. Y., 1903], 121 Fed. 1014; *Duncan* v. *Fox* [S. D. Fla., 1924], 300 Fed. 165; *Massachusetts Mutual Life Insurance Co.* v. *Grossman* [S. D. N. Y., 1933], 4 F. Supp. 990; *In re Barber* [S. D. N. Y., 1934], 7 F. Supp. 806).

These cases determine that where the property in question is not in the possession of the bankruptcy court and the suit cannot mature into any charge on the assets of the bankrupt estate, being only an invitation to come in and get more assets if the trustee be entitled thereto, leave of the bankruptcy court to make the trustee a party defendant is unnecessary. Since leave is not necessary, the bankruptcy court is without power to restrain the joinder of the petitioner as a party defendant.

The Pennsylvania suit is clearly not an attempt to deprive the bankrupt estate of assets. It merely extends to the petitioner an invitation to establish his right to assets. In it respondent seeks no affirmative relief against petitioner nor any decree as to property actually or constructively in his possession.

Consequently there is no merit to the statement that no leave from the bankruptcy court had been granted the respondent prior to the service of process in the Pennsylvania suit upon the petitioner pursuant to § 57 of the Judicial Code.

POINT IV

Dicta cannot be prejudicial to the petitioner.

In the instant case the recital, in the opinion of the Circuit Court of Appeals (R. 101-106), of the facts and conclusions leading up to its decision were wholly justified. As stated in the beginning of this brief, at page 17, there is but one question before this Court, namely, the justification for the *decision* of the Circuit Court of Appeals. That was the only question presented by petitioner in his petition for the writ of certiorari granted herein. However, in his brief on certiorari, petitioner presents an additional question concerning the justifica-

tion of the alleged dicta in the *opinion* of the Circuit Court of Appeals. This Court has held that "The only question for consideration is that stated in the petition for writ of certiorari. *Gunning* v. *Cooley*, 281 U. S. 90, 98." (*Helvering* v. *Taylor*, 293 U. S. 507, 511.) Therefore, no consideration should be given to petitioner's Point III.

Petitioner's application to have this Court review and modify the *dicta* of the Circuit Court of Appeals is without precedent.

Respondent is not to be deprived of a vested right to prosecute its Pennsylvania suit because of alleged dicta in the opinion of the Circuit Court of Appeals. If, as respondent contends, the bankruptcy court was without power to enjoin the prosecution of respondent's Pennsylvania suit, it would be an unwarranted penalty for this Court to deprive respondent of its rights merely because the Circuit Court of Appeals in its opinion may have gone beyond the precise issue presented to it.

However, respondent would be remiss if it neglected to point out facts justifying the opinion of the Circuit Court of Appeals. In doing so, respondent does not waive its right to have the Court refuse to pass upon the question relating to the opinion of the Circuit Court of Appeals in view of the case of *Helvering* v. *Taylor*, supra. The alleged dicta as identified and numbered by the petitioner will be treated seriatim.

1. The Circuit Court of Appeals stated that a cloud had been created on respondent's title to the assets in the Sparks account as a result of the issuance of the subpoena by the Capital Company. Although mentioning this as alleged dicta, petitioner apparently finds no fault except to admit that the question is open to substantial doubt. We earnestly submit that the opinion of Judge

LEARNED HAND of the Circuit Court of Appeals for the Second Circuit, in *Capital Co.* v. *Fox,* 85 F. (2d) 97, demonstrates that J. W. Sparks & Co. were put in jeopardy by being forced to determine whether the assets belonged to respondent or were subject to some claim on the part of the creditors of William Fox. Therefore, the position taken by Sparks & Co. in refusing to deal with respondent (R. 95) is readily understandable. The existence of the cloud can best be seen from the answer interposed in the Pennsylvania suit by J. W. Sparks & Co. (R. 91-99). This answer definitely concedes the existence of the cloud (R. 22, 95).

2. The second claimed dicta is that the Pennsylvania Court is the only court that can remove the cloud upon the title to the securities. The suggestion of petitioner that the District Court for the Southern District of New York could have aided the respondent is untenable. That court could not have affected the rights of petitioner, since he could not be made a party to any suit pending in that court. It was necessary to go where the *res* was located to get jurisdiction over the petitioner. The inadequacy of any forum other than the Pennsylvania Court is more fully discussed, supra, on page 9.

3. The third alleged dicta is the statement in the opinion of the Circuit Court of Appeals that the controversy in the plenary action filed by petitioner in the Court of Chancery of New Jersey in October of 1936, so far as All Continent Corporation is concerned, is substantially the same controversy that is involved in the Pennsylvania Court. Petitioner admits this fact at page 8 of his brief, wherein he states that the assets sought by petitioner in the plenary suit included the assets in the Pennsylvania suit. The issue as to these assets is identical to the issue as to all of the assets.

4. As to the alleged dicta concerning separable controversies, it may be said: (a) Contrary to the statement of the petitioner, the argument by respondent's counsel in the Circuit Court of Appeals did include an analysis of the bill of complaint in the plenary suit and that analysis of necessity separated the controversies and issues as the Circuit Court of Appeals later found them. (b) The opinion of Vice-Chancellor Sooy in the New Jersey Chancery Court on the application to remove the cause to the Federal Court (*Steelman* v. *All Continent Corporation, et al.*, 121 N. J. Eq. 218), which nowhere referred to the opinion of the Circuit Court of Appeals, clearly demonstrates that both respondent's counsel, in argument, and the Circuit Court of Appeals, in its opinion, were correct. (c) It is interesting to note petitioner's statement that dicta in an opinion of the Circuit Court of Appeals may have an effect on the District Court because that court knowing its other decisions in other cases will be subject to review by the same Circuit Court of Appeals, might hesitate to make a decision contrary to a dicta by the Appellate Court. That reasoning is both an unnecessary and unwarranted reflection on the District Court and the Circuit Court of Appeals.

5-6-7. These alleged dicta are to the effect that the trustee, to establish his ownership of respondent's property, including the securities in the possession of J. W. Sparks & Co., must prove all of his averments in the bill in the Chancery Court which relate to the assets of respondent and that an adjudication in Pennsylvania would be binding on respondent everywhere. It is perfectly obvious that petitioner, to succeed in his claim to the securities in the possession of J. W. Sparks & Co., must of necessity prove that he is entitled to part, as well as all, of the assets of respondent.

At page 8 of petitioner's brief, it is asserted, "The assets sought in this action [referring to the plenary suit] included not only the securities involved in the Pennsylvania suit, but all of the other assets held in the name of All Continent • • • ". This is an admission that respondent's securities in the Sparks account are in part, the identical *res* which is sought to be recovered in the plenary suit. Nowhere is there a single suggestion that the issue of the true ownership of the assets in the possession of J. W. Sparks & Co. would involve a single fact different from, or in addition to, facts which petitioner would need to prove in support of his allegations in the bill of complaint in his plenary suit insofar as they affect the assets of respondent.

8. As indicated in Point II, supra, pages 36-55, the United States District Court for the Eastern District of Pennsylvania did acquire exclusive jurisdiction of the controversy relating to the ownership of the securities in the account with J. W. Sparks & Co. The Pennsylvania court, having first acquired jurisdiction of the property in controversy is entitled to maintain exclusive jurisdiction until the issue is terminated. The Circuit Court of Appeals was merely expressing the general rule which this Court has so often reiterated as necessary to preserve harmony among the courts of different jurisdictions. (*Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 197; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *Palmer* v. *Texas*, 212 U. S. 118, 129; *Farmers Loan & Trust Company* v. *Lake Street Elevated Railway Co.*, 177 U. S. 51, 61.)

In *Fort Dearborn Bank* v. *Smalley* (C. C. A. 8, 1924), 298 Fed. 45, the Circuit Court of Appeals therein likewise properly discussed the exclusive control of property in an analagous case and likewise there determined that because another court had exclusive control of the *res* the petition

of the trustee in bankruptcy to enjoin the suit in the other court must be vacated (see pp. 22-26, supra).

9. The next alleged dicta is that respondent is "entitled to maintain the exclusive jurisdiction which it thus acquired under the authority of § 57 of the Judicial Code and may, upon proper application, restrain the trustee from litigating the controversy elsewhere" (petitioner's brief, p. 58).

Petitioner overlooks the use by the Circuit Court of Appeals, of the words, "upon proper application". Respondent here reiterates the position that the application which it did make to maintain the Pennsylvania court's exclusive jurisdiction was proper. Apparently the Pennsylvania court agreed. Whether the Circuit Court of Appeals on an appeal will agree with the Pennsylvania court's order is undetermined. If petitioner contends that the application to maintain its exclusive jurisdiction, which was made to the Pennsylvania court, was improper, it is petitioner's prerogative to test that out in the usual, normal and orderly manner by appeal which he has perfected.

10. Petitioner also finds fault with the statement of the Circuit Court of Appeals that "The Capital Company had been and is seeking to get these securities not for the creditors as a whole but for itself". Here, the concerted action of petitioner and Capital Company becomes most apparent. Counsel for the Capital Company appears as one of the attorneys of record for the petitioner in this proceeding.

In the answer filed by the Capital Company in the Pennsylvania suit, the contention is raised that the Capital Company and the receiver appointed exclusively for it in the United States District Court for the Southern District of New York has become vested with absolute title

to the interest of William Fox in the securities in the Sparks account. This is necessarily exclusive of and superior to the rights of petitioner. It is furthermore admitted in petitioner's brief, at page 60, that Capital Company has asserted its position in the bankruptcy court as well as in the Pennsylvania suit.

11. The Circuit Court of Appeals stated in effect that the petitioner should defend the Pennsylvania suit. The Circuit Court of Appeals has as much power and right to direct a trustee in bankruptcy as to the scope of his duties as any District Court sitting as a court of bankruptcy. Other Circuit Courts of Appeal have done so and likewise District Courts have denied injunctions petitioned for by trustees in bankruptcy and ordered the trustees to appear and defend suits in other jurisdictions.

In *Duncan* v. *Girand* (C. C. A. 5, 1921), 276 Fed. 554, reversing a decree of the District Court which had enjoined a suit in a State court in which the trustee in bankruptcy had been made a party defendant, the Circuit Court of Appeals stated: "We are of opinion that appellee [trustee in bankruptcy] should submit his rights to the state court" (p. 556).

In *In re Worall* (C. C. A. 2, 1935), 79 F. (2d) 88, fifty days before Worall filed a voluntary petition in bankruptcy, his membership in the New York Stock Exchange was sold, the proceeds of which the exchange held ready to turn over to any party entitled thereto. The sale was caused by the exercise of an option held by one of Worall's partners, a Mrs. Rubin. She claimed the amount as liquidator under the partnership agreement. Worall started suit in the Supreme Court of New York, to dissolve the partnership and for the appointment of a receiver. Worall's former wife commenced sequestration

proceedings to enforce alimony payments, in which the appellee, Heyman, had been appointed receiver and in which proceedings Worall and all other persons possessing his property were restrained from transferring it. Mrs. Rubin commenced an action in the Supreme Court of New York against the New York Stock Exchange for money had and received to recover the proceeds of the sale of the seat, whereupon Worall filed his voluntary petition in bankruptcy. After his appointment, the trustee in bankruptcy applied to the bankruptcy court to restrain the plaintiffs from proceeding in each of the three New York actions and for an order directing the New York Stock Exchange to turn over the proceeds to the trustee in bankruptcy. The District Court denied the motion of the trustee in bankruptcy and on the other hand *ordered* the trustee to appear in the action brought by Mrs. Rubin against the Stock Exchange having "decided that the proceeds were not in the actual or constructive possession of the bankrupt or the latter's trustee" (pp. 89, 90). The Circuit Court of Appeals affirmed the order below.

In *Heath* v. *Shaffer* (N. D. Iowa, 1899), 93 Fed. 647, a suit in equity in the State court was commenced by chattel mortgagees against the bankrupt corporation (the mortgagor) and its trustee in bankruptcy. Thereupon, the trustee in bankruptcy filed a bill of equity in the United States District Court to restrain the chattel mortgagees from further prosecuting the State court suit to foreclose the mortgage. Denying a motion for a preliminary injunction, the court held:

> "He [trustee in bankruptcy] should appear in the state court, and, by pleading the adjudication in bankruptcy and his appointment as trustee, lay the foundation for the protection of his rights. If

> he questions the jurisdiction of the state court, he can plead thereto in proper form. • • • If he wishes to contest the validity or extent of the adverse claim asserted by the plaintiff in the state court, he can do so by answer or cross bill. • • • In some of the discussions had upon this general subject, it seems to be assumed that the state courts cannot aid in carrying out the general provisions of the bankrupt act, and that the trustee can only appeal to the courts of bankruptcy when seeking to secure a disposition of the bankrupt's estate under the act; but this is a mistaken view of the law. The state courts, in all proceedings pending before them, have the right to apply and enforce the provisions of the bankrupt act in the determination of the questions at issue before them, and can give full protection to the rights of the trustee. The bankrupt act is the law of the land, and the state courts have full right to enforce its mandate in all proceedings properly before them. • • • What is meant is that in all suits pending before them, wherein it may be involved a contest between the trustee and a third party, which depends, in whole or in part, upon the provisions of the bankrupt act, the state courts must, of necessity, have full right and jurisdiction to apply and enforce the provisions of the bankrupt act, not only in deciding the question of right at issue, but in securing to the parties the proper protection accorded to them under the act • • •" (pp. 649, 650).

This statement by the District Court sums up the respondent's contention. A fortiori, a Federal court will protect the petitioner's rights. Petitioner will lose no rights in the Federal court in Pennsylvania which he would be entitled to in either the State or Federal court in New Jersey and there is no reason whatsoever why, because he is a trustee in bankruptcy, and not another person, he should be immune from the effect of proper process issued pursuant to § 57 of the Judicial Code and issued out of the United States District Court

for the Eastern District of Pennsylvania. The Circuit Court of Appeals was justified in its statement.

In any event, expressions found in the opinion of the Circuit Court of Appeals which may go beyond the points involved do not come within the rule of *stare decisis*. (*Humphrey's Executor* v. *United States*, 295 U. S. 602, 626), and do not control judgments in subsequent suits. (*Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291.) In the most recent opinion of this Court, *Brush* v. *Commissioner of Internal Revenue*, — U. S. —, — (decided March 15, 1937), the Court again reiterated this proposition, stating:

> "Expressions of that kind may be respected, but do not control in a subsequent case when the precise point is presented for decision. Osaka Shosen Kaisha Line v. United States, 299 U. S. —, — (February 1, 1937), and authorities cited." [United States Law Week, March 16, 1937, at p. 6.]

Consequently, dicta, if any be found, cannot be prejudicial to the petitioner.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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